BRB No. 96-1666

TADEUSZ KORZENIEWSKI	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SOUTHWEST MARINE, INCORPORATED	)	DATE ISSUED: _____
	)	
and	)	
	)	
LEGION INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits and Decision and Order On Petition For Reconsideration of Ellin M. O'Shea, Administrative Law Judge, United States Department of Labor.

Steven M. Birnbaum, San Francisco, California, for claimant.

Frank B. Hugg and Wendy B. Moseley, San Francisco, California, for employer/carrier.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits and Decision and Order On Petition For Reconsideration (95-LHC-1096) of Administrative Law Judge Ellin M. O'Shea rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.,* 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On July 9, 1992, claimant was working as an outside machinist for employer when a fifteen pound gear box fell sixty to eighty feet, hitting him in the left shoulder, causing him to fall. As a result of this injury, claimant sustained a comminuted fracture of the left acromion and underwent two surgeries on January 23, 1993, and April 23, 1993, performed by Dr. Lee, an orthopedic surgeon. While claimant was recuperating from his second

surgery, he was involved in a motor vehicle accident on May 20, 1993, which was unrelated to his work injury. Claimant was rendered unconscious in this accident, and thereafter came under the care of Dr. Wong, an internist, for cervical and lumbar complaints. In June 1993, Dr. Lee released claimant to return to work 8 hours a day with a lifting restriction of 10 to 20 pounds, and no reaching at or above shoulder level with his left arm. Claimant was provided vocational rehabilitation services from June 2, 1993, until November 19, 1993, by Mr. Kwoka, a certified vocational consultant with the United States Department of Labor (DOL), who explored the possibility of his obtaining work in carburetor repair and as a locksmith. In January 1994, claimant returned to Dr. Lee, who in April 1994, noted a psychological component to claimant's complaints which he associated with claimant's July 9, 1992, work injury. Dr. Wong also noted the onset of a depressive condition in June 1994. At his counsel's request, claimant was evaluated by Dr. Powers, a Board-certified psychologist and neurologist, who diagnosed claimant as suffering from post-traumatic stress disorder and major depression attributable in part to his July 9, 1992, work injury.

Claimant sought temporary total disability benefits under the Act, alleging that in addition to the physical effects of his injury, he suffers from post-traumatic stress disorder and/or depression due in part to his work injury. At the hearing before the administrative law judge, the parties stipulated that claimant reached maximum medical improvement from his shoulder injury on January 18, 1994, that as a result of his shoulder injury claimant is unable to perform his prior work duties, and that employer is liable for reasonable and necessary medical benefits for this injury. Accordingly, the disputed issues before the administrative law judge included the nature and extent of claimant's disability resulting from the shoulder injury, the cause of claimant's psychological injury, if any, and employer's liability for past and present psychological treatment.

Based on the medical opinion of Dr. Brodsky, the administrative law judge found that as of July 21, 1995, claimant was not suffering from post-traumatic stress disorder, depression, or any other form of mental disease which would disable him from working in any occupation. For the period from June 23, 1994, until the time of Dr. Brodsky's examination on July 25, 1995, however, the administrative law judge found that claimant suffered from depressive symptoms due in part to his work-related injury. The administrative law judge further found that, as the parties stipulated that claimant could not return to his regular job based on his orthopedic injury and the evidence submitted by employer was not sufficient to establish the availability of suitable alternate employment at any time, claimant is totally disabled under the Act. Accordingly, she awarded claimant permanent total disability compensation from January 18, 1994, until June 23, 1994, for his shoulder injury, temporary total disability compensation from June 23, 1994, until June 21, 1995, for depression due in part to his work injury, and permanent total disability benefits thereafter for the shoulder injury.

Employer appeals the administrative law judge's findings that it did not establish suitable alternate employment and that claimant was temporarily totally disabled by a psychological condition from June 1994 to June 1995. Claimant responds, urging affirmance.

Employer challenges the administrative law judge's finding that it did not demonstrate through the vocational report of Mr. Kwoka that suitable alternate employment was available at the time claimant reached maximum medical improvement. Employer asserts that the administrative law judge erred in discounting the vocational testimony of Mr. Kwoka based on her determination that the information was obtained as part of a DOL-sponsored rehabilitation plan and therefore could not serve as a basis for establishing suitable alternate employment. Moreover, employer contends that the administrative law judge erred in concluding in her decision on reconsideration that Mr. Kwoka's testimony is insufficient to establish the availability of suitable alternate employment because of his failure to identify any actual job openings in carburetor repair at the time he performed his September 1993 labor market survey.

In the present case, as it is undisputed that claimant is unable to perform his usual work due to his shoulder injury, claimant has established a *prima facie* case of total disability, and the burden shifted to employer to establish the availability of suitable alternate employment. The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has held that in order to meet its burden employer must demonstrate that specific job opportunities which claimant can perform are realistically and regularly available to claimant in his community. *Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81 (CRT) (9th Cir. 1993)*; Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122 (CRT) (9th Cir. 1988); *Bumble Bee Seafoods v. Director, OWCP,* 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980).

Initially, as employer notes on brief, the administrative law judge's decision is confusing, discussing three periods of disability--permanent total disability from maximum medical improvement to June 1994 due to claimant's shoulder injury, temporary total disability from June 1994 to June 1995 due to symptoms of depression, and permanent total disability due to the shoulder resuming after June 1995. These awards warrant clarification prior to our discussion of the specific arguments raised. Employer stipulated that claimant cannot return to work due to the physical effects of his work-related injury. Absent a finding of suitable alternate employment, claimant is thus permanently totally disabled from January 18, 1994, and continuing, as there is no argument his physical condition changed. Any disability due to work-related depression does not alter this award, as claimant cannot recover separately for temporary total disability and permanent total disability. Therefore, the disability issues here concern whether employer established that suitable alternate employment was available on two occasions, prior to maximum medical improvement in 1994, and again in 1995.

Employer's contention that the administrative law judge erred in concluding that Mr. Kwoka's report from his work with claimant in 1993 could not be considered as evidence of suitable alternate employment for the reason that it was submitted as part of a DOL-sponsored rehabilitation plan has merit, in that evidence regarding vocational rehabilitation is relevant to the availability of suitable alternate employment regardless of its source. Any error the administrative law judge may have made in this regard, however, is harmless in this case, as the administrative law judge rationally found in her decision on reconsideration that Mr. Kwoka's opinion was not sufficient to meet employer's burden of establishing suitable alternate employment because he never identified any specific suitable available job opportunities. EX-13.

After considering claimant's age, education, physical restrictions, and language difficulties, Mr. Kwoka limited his inquiry to carburetor repair and locksmithing jobs. In his report of September 23, 1993, Mr. Kwoka identified three employers who had openings for carburetor repair work within the preceding 90 days but conceded that no jobs were actually available at the time he conducted his survey, or at any other time during which he was handling claimant's case. *See* Tr. at 406, 428-429. Moreover, as noted by the administrative law judge in her decision on reconsideration, Mr. Kwoka testified that each of the carburetor jobs identified in the September 1993 survey required experience which claimant did not have, and as a result, he anticipated that claimant would require additional rehabilitation services, including on-the-job training. Tr. at 425-426. Although Mr. Kwoka also conducted a close-out labor market survey in February 1994, he testified that the only carburetor job available at that time was not suitable because the employer felt that claimant required too much training to be competitive. Tr. at 418-419. While Mr. Kwoka also identified several locksmithing jobs in his February 1994 survey, he testified at the hearing that none of the positions actually available were physically appropriate for claimant. Tr. at 416-417. Inasmuch as the administrative law judge's finding that Mr. Kwoka's testimony is insufficient to establish the availability of suitable alternate employment is rational and supported by substantial evidence, we affirm that determination. Thus, the administrative law judge's award of permanent total disability compensation commencing January 18, 1994, is affirmed.

Employer next contends that the administrative law judge erred in finding that it did not establish the availability of suitable alternate employment in 1995. Employer maintains that inasmuch as its vocational expert, Ms. Dodge, identified a job as a dental lab technician at Chan Laboratories which was suitable and available at the time she conducted her 1995 survey, claimant is entitled only to permanent partial disability benefits from June 23, 1995.

We affirm the administrative law judge's finding that the job at Chan Laboratories does not constitute suitable alternate employment. Employer asserts that the finding that this single job is not sufficient is contrary to Board and circuit precedent, citing *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CRT), *reh'g denied,* 935 F.2d 1293 (5th Cir. 1991), in support of this contention. As claimant correctly notes, however, the present case arises with the jurisdiction of the United States Court of Appeals for the Ninth Circuit, and

that court has not adopted the approach taken in *P & M Crane*. Contrary to employer's argument, the precedent is not unanimous on the issue of the sufficiency of one available job, as the United States Court of Appeals for the Fourth Circuit has held that a range of jobs must be shown and thus, one specific job is insufficient. *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT)(4th Cir. 1988). Moreover, while the Ninth Circuit has not ruled on the precise issue, it has held that employer must demonstrate that suitable alternate work is "realistically and regularly" available in the community in order to meet its burden, *Edwards*, 999 F.2d at 1375, 27 BRBS at 83 (CRT), and has stated that "employer must point to specific jobs that the claimant can perform." *Bumble Bee,* 629 F.2d at 1330, 12 BRBS at 662.

In the instant case, we need not determine whether *P & M Crane* or *Lentz* is consistent with the standard adopted by the Ninth Circuit,[1] because even under *P & M Crane,* one job is not automatically sufficient. In that case, the court held that one job may be sufficient to demonstrate a realistic job opportunity under appropriate circumstances, such as where the employee is highly skilled, the job found by the employer is specialized, and the number of workers with suitable skills is small. The court also noted evidence of the general availability of jobs in the community and remanded for reconsideration of the totality of this evidence in conjunction with the evidence of a specific job. The administrative law judge's decision in this case is not inconsistent with the result in *P & M Crane*.

[1]However, we must note that employer's reliance on Fifth Circuit precedent, rather than the controlling precedent of the Ninth Circuit is surprising, particularly in view of the Fifth Circuit's explicit rejection of the Ninth Circuit's holding in *Bumble Bee* in both *P & M Crane* and its predecessor, *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981).

The administrative law judge rationally considered whether circumstances existed such that claimant could likely obtain the job, and found they did not. Specifically, the administrative law judge discounted Ms. Dodge's testimony that the job was suitable for claimant because she did not personally interview claimant or determine if his European education would satisfy the job's requirement that claimant have a high school diploma. The administrative law judge also noted that in conducting her surveys, Ms. Dodge confused arm strength and grip strength and did not appear to have a thorough knowledge of the exertional demands of the jobs she surveyed; the administrative law judge found this particularly significant given the nature of claimant's injury and the requirements of the job.[2] Inasmuch as the administrative law judge provided valid reasons for rejecting Ms. Dodge's testimony, and employer has not presented evidence of other specific jobs sufficient to meet the standard of *Edwards* and *Bumble Bee*, we affirm the finding that employer did not establish the availability of suitable alternate employment in 1995. Inasmuch as employer does not otherwise contest the award of permanent total disability compensation, it is affirmed.

We also reject employer's assertion that the administrative law judge erred in concluding that claimant suffered from work-related depression from June 23, 1994 to June 21, 1995.[3] Employer characterizes this determination as illogical, inconsistent with the administrative law judge's otherwise negative assessment of claimant's credibility, and flatly contradictory to the testimony of Dr. Wong, upon whom the administrative law judge purportedly relied. With regard to the finding that claimant had depression, however, in her Decision and Order at 13, the administrative law judge explained that although she discredited Dr. Powers's diagnosis of post-traumatic stress syndrome, she nonetheless credited his September 1994 diagnosis of depression because it is corroborated by other medical evidence in the record. Specifically, she noted that Dr. Lee recommended that claimant receive psychiatric help because of a change in personality which he attributed to anger about his inability to return to his regular work and activities because of his work injury, EX-4 at 113, and Dr. Wong tentatively diagnosed claimant as having depression. In addition, the administrative law judge noted that Dr. Brodsky confirmed, based on his review of claimant's records, that at the time Dr. Powers first saw claimant in September 1994, he suffered from symptoms of depression. Decision and Order at 13. Inasmuch as

[2]The administrative law judge also noted that Ms. Dodge's attestation as to the job was contradicted by the testimony of claimant's counsel's law clerk, Lydia Mendoza. Ms. Mendoza testified that when she contacted this employer by phone on August 21, 1995, to verify the information provided by Ms. Dodge, she was informed that this job required lifting 20-25 pounds, which exceeded claimant's restrictions, as well as 3 to 4 years of experience. Tr. at 545-549.

[3]As previously discussed, even if claimant's depression were not work-related, employer is nonetheless liable for total disability compensation during this period as we have affirmed the finding that employer did not establish the availability of suitable alternate employment. This argument is thus relevant only to medical benefits.

the evidence relied upon by the administrative law judge provides substantial evidence to support her finding that claimant had a psychological condition, we reject employer's argument to the contrary.

The administrative law judge also rationally found that claimant's depression during the period in question was work-related. Inasmuch as claimant established that he suffered a psychological injury, depression, and the occurrence of the June 9, 1992, work accident was not in dispute, the administrative law judge properly found that claimant is entitled to the Section 20(a), 33 U.S.C. §920(a), presumption that this condition is work-related. *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990). Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition is not caused or aggravated by his employment. *See Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995). If the administrative law judge finds that the Section 20(a) presumption is rebutted, she must then weigh all of the relevant evidence and resolve the causation issue based on the record as a whole. *See Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985).

In the present case, after finding the presumption rebutted based on Dr. Brodksy's opinion,[4] the administrative law judge proceeded to consider the evidence as a whole. In so doing, she initially noted that in June 1994, when Dr. Wong diagnosed claimant as depressed, he related claimant's symptoms not to post-concussion syndrome, but to depression.[5] Decision and Order at 15, citing Tr. at 378. The administrative law judge noted that employer relied on Dr. Brodsky, but stated that she had previously weighed all the evidence as to claimant's depressive symptoms in 1994 and then concluded claimant's June 1994 symptoms, which ultimately resulted in his decompensation in Dr. Powers's office, were due in part to his work injury. The statement that the evidence had already been weighed is apparently a reference to her earlier discussion of claimant's psychological

[4]We note that the administrative law judge misstated Dr. Brodsky's testimony in finding it sufficient to rebut the Section 20(a) presumption. Dr. Brodsky initially stated "in my opinion the injury itself did not play a role in producing the depression in 1994." Tr. at 512; *see also* Tr. at 475. Contrary to the administrative law judge's statement that this opinion was based on a reasonable degree of medical certainty, however, Dr. Brodsky stated he *could not*, with a reasonable degree of medical certainty or probability, rule out the work injury as a contributor to claimant's depression. Tr. at 514. He also stated that he had no doubt that claimant's disability as a result of the work injury was a source of a problem to him, Tr. at 519, as were his future employment prospects. Tr. at 520. We need not address whether this opinion is sufficient to rebut Section 20(a) in light of our review of the administrative law judge's weighing of the evidence as a whole.

[5]Employer's position before the administrative law judge was that claimant's depression was not related to his industrial injury but rather to physical pain and post-concussive syndrome resulting from his May 1993 auto accident, medications he was taking, and pressure from the lawsuit for the auto accident.

condition in the section of her decision on disability, wherein the administrative law judge generally credited Dr. Brodsky. However, she found he first saw claimant in June 1995 and stated that while claimant was not suffering from a psychological disorder at that time, his review of the records showed that claimant suffered from symptoms of depression when seen by Dr. Powers in 1994. Noting that earlier she had discredited Dr. Powers's diagnosis of post-traumatic stress disorder and afforded his opinion less weight than that of Dr. Brodsky, she stated she nonetheless credited his diagnosis of depression symptoms from 1994 through the date of Dr. Brodsky's 1995 examination, finding it also corroborated by the opinion of Dr. Wong. Decision and Order at 13. Thus, in ruling on causation, the administrative law judge found these symptoms related, in part, to claimant's 1992 work injury, consistent with the credited portion of the opinions of Drs. Powers and Wong.

With regard to claimant's credibility, she further stated that while she had serious reservations regarding the reliability and trustworthiness of claimant's representations to his doctors, his testimony was nonetheless credible in some measure. The administrative law judge found that the record reflected that claimant was juggling events and circumstances including medical treatment and litigation due to both the July 9, 1992, work injury and his subsequent auto accident which contributed in some measure to his 1994 psychological state. Decision and Order at 16. In so concluding, she noted that both Dr. Powers and Dr. Brodsky agreed that the finalization of the claim would determine in large measure when claimant would be able to return to work.

The administrative law judge's Decision and Order thus reflects that her finding that claimant's depressive symptoms in 1994 were due in part to his work-related injury is based on her finding that the evidence weighed in claimant's favor and not, as employer suggests, on application of the "true doubt rule" which the United States Supreme Court rejected in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT) (1994). Moreover, while employer asserts that the administrative law judge's finding that claimant's depression is in part work-related is inconsistent with Dr. Wong's opinion, the administrative law judge rationally viewed Dr. Wong's June 23, 1994, medical records, in which he noted that claimant related his depression to being out of work since July 1992, as corroborative of Dr. Powers's September 1994 diagnosis of depression due to the July 9, 1992 work injury.[6] While employer maintains that the administrative law judge's ultimate determination

[6]Dr. Wong testified at the hearing that although he did not know the cause of claimant's depression when he examined him in June 1994, he felt that it was not due to post-concussive syndrome and that claimant stated that part of it was because he had not been working since July 1992. Tr. at 378. In contrast to this testimony, however, on November 2, Dr. Wong authored a letter to the attorneys who represented claimant with regard to the auto accident in which he related claimant's depression to chronic pain syndrome arising out of the auto accident. Tr. at 386. Dr. Wong testified that at the time he rendered this opinion, however, he had not been given much information about claimant's work accident. Tr. at 387. In addition, Dr. Wong testified that he felt that the fact that claimant related his depression to the fact that he had not been working since 1992 was important because the inability to work can lead to depression. Tr. at 388.

that claimant's depression is in part work-related is irrational in light of her prior negative assessment of claimant's credibility, the administrative law judge may accept or reject all or any part of a witness's testimony according to her judgment. *Perini Corp. v. Heyde*, 306 F. Supp. 1321 (D.R.I. 1969). Inasmuch as Dr. Powers's September 1994 diagnosis was corroborated in part by Dr. Wong's June 23, 1994, records, and the credited portions of claimant's testimony provide substantial evidence to support the administrative law judge's finding that claimant suffered from depression related in part to his work injury, we affirm that determination.

Accordingly, the Decision and Order - Awarding Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. MCGRANERY
Administrative Appeals Judge